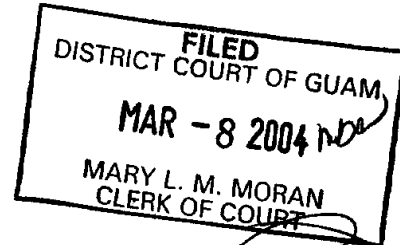


ORIGINAL

C. SALVATORE D'ALESSIO, JR.
Senior Trial Attorney, Civil Division
U.S. DEPARTMENT OF JUSTICE
Constitutional Torts Staff
P.O Box 7146, Ben Franklin Station
Washington, D.C. 20044-7146
Telephone: (202) 616-4168
Facsimile: (202) 616-4314
LEONARDO M. RAPADAS
United States Attorney
RUSSELL C. STODDARD
First Assistant U.S. Attorney
Sirena Plaza, Suite 500
108 Hernan Cortez Avenue
Hagatna, Guam 96910



Attorney for Defendant John S. Unpingco

IN THE UNITED STATES DISTRICT COURT

FOR THE

TERRITORY OF GUAM

)	CIVIL ACTION CASE: 03-00038
SEAN FRANCIS SCHOOL)	
MAFNAS,)	
)	<u>MEMORANDUM IN SUPPORT OF</u>
Plaintiff,)	<u>MOTION TO DISMISS</u>
v.)	<u>WITHOUT LEAVE TO AMEND</u>
)	<u>FILED ON BEHALF OF</u>
JOHN S. UNPINGCO, et al.,)	<u>DEFENDANT JOHN S. UNPINGCO</u>
)	
Defendants.)	
)	

Defendant John S. Unpingco, Chief Judge for the United States District Court for Guam (hereinafter "Judge Unpingco"), by and through the undersigned counsel, respectfully submits the following Memorandum of Points and Authorities in Support of his Motion to Dismiss the Complaint Without Leave to Amend.

INTRODUCTION

Plaintiff in this case, Sean Francis School Mafnas ("plaintiff") alleges that he was forced to wear leg irons while incarcerated. Complaint at ¶ 7. He further alleges that the Chief Judge dismissed a civil action filed by the plaintiff in 1998. Complaint, ¶ 8. That complaint was against the Government of Guam. Plaintiff goes on to allege that he filed a second complaint, this time naming the Director of the Guam Department of Corrections, in 1999. This suit was presided over by defendant Judge John S. Unpingco and also resulted in a dismissal. Complaint, ¶ 11.

Based on those facts as stated by the Plaintiff, he claims a violation of First Amendment rights and his right to due process. Complaint ¶ 20 and 21.

Plaintiff's claim parallels that of a Bivens action under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).^{1/} The remaining causes of action

^{1/} Although plaintiff also purports to bring a civil rights claim under 42 U.S.C. § 1983, that claim is jurisdictionally flawed. In order to state a claim for relief under 42 U.S.C. § 1983, plaintiffs must show that they have been subjected to a deprivation of a right protected by federal law by a person acting under color of state law. This is a jurisdictional requisite to bringing suit under Section 1983. See Parratt v. Taylor, 451 U.S. 527, 535 (1981). In the case at bar, Judge Unpingco was, at all times pertinent to the plaintiff's claims, acting under color of **federal** law. Accordingly, plaintiff cannot satisfy the "color of state law" requirement and therefore cannot maintain an action under 42 U.S.C. § 1983. See, e.g., United States v. Classic, 313 U.S. 299, 326 (1941); Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 156-57 (1978); Polk County v. Dodson, 454 U.S. 312, 317-18 (1981); Ort v. Pinchback, 786 F.2d 1105, 1107 (11th Cir. 1986).

1 are alleged against Assistant U.S. Attorneys Marivic P. David and
2 Mikel W. Schwab. They are addressed in a separate Motion To
3 Dismiss.

4 It is evident from the Complaint that all of plaintiff's
5 claims against Judge Unpingco arise solely out of the performance
6 of his judicial responsibilities. The two incidents speak
7 directly to decisions issued by the Judge. Moreover, plaintiff
8 sues defendant Unpingco as "the Chief Presiding Judge for the
9 U.S. District Court of Guam," Id. at ¶ 3.

10 By way of the present motion, Judge Unpingco moves, pursuant
11 to *Fed. R. Civ. P. 12(b)*, to dismiss plaintiff's claims. For
12 relief, Judge Unpingco seeks a dismissal of plaintiff's claims
13 without leave to amend and any other relief that this Court deems
14 warranted under the circumstances.

15 STANDARD OF REVIEW

16 Dismissal is appropriate pursuant to *Fed. R. Civ. P. 12(b)*
17 where a plaintiff can prove no set of facts in support of his
18 claim that would entitle him to relief. See Buckey v. County of
19 Los Angeles, 968 F.2d 791, 794 (9th Cir.), cert. denied, 506 U.S.
20 999 (1992). Review is based upon the contents of the Complaint.
21 Moore v. City of Costa Mesa, 886 F.2d 260, 262 (9th Cir. 1989).
22 In addition, the Court may properly look beyond the Complaint to
23 items in the record of the case or to matters of general public
24 record. Emrich v. Touche Ross & Company, 846 F.2d 1190, 1198
25 (9th Cir. 1988); 5A C. Wright & A. Miller, Federal Practice and
26 Procedure § 1357 at 299 (2d ed. 1990). See also MGIC Indem.
27 Corp. v. Weisman, 803 F.2d 500, 504 (9th Cir. 1986) (on a motion
28 to dismiss, the Court may take judicial notice of matters of

1 public record outside the pleadings); and *Fed. R. Evid. 201*
2 (Court may take judicial notice of adjudicative fact). All
3 allegations of material fact in the Complaint are taken as true
4 and construed in the light most favorable to the non-moving
5 party. *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir.
6 1989). However, the Court is not required to accept legal
7 conclusions cast in the form of factual allegations if those
8 conclusions cannot reasonably be drawn from the facts alleged.
9 *Papasan v. Allain*, 478 U.S. 265, 286 (1986); *Holden v. Hagopian*,
10 978 F.2d 1115, 1121 (9th Cir. 1992); *United States ex rel. Chunie*
11 *v. Ringrose*, 788 F.2d 638, 643 n. 2 (9th Cir. 1986). Where, as
12 here, the facts alleged in the Complaint do not state a claim
13 upon which relief can be granted as a matter of law, the
14 Complaint should be dismissed under *Fed. R. Civ. P. 12(b)*.

15 DISCUSSION

16 The Complaint purports to sue Judge Unpingco in both his
17 official and individual capacities, seeking damages based upon
18 the alleged violation of plaintiff's constitutional rights (see
19 ¶¶ 3, 6, 7, 8, 9, 10 and 11). Again, all of plaintiff's claims
20 against Judge Unpingco arise out of the latter's performance of
21 his judicial responsibilities. To the extent that plaintiff's
22 claims can be construed as official-capacity claims, they are
23 barred by sovereign immunity. In addition, all of the
24 plaintiff's constitutional claims against Judge Unpingco are
25 barred by absolute immunity. Finally, because plaintiff claims
26 against Judge Unpingco rely on events that occurred prior to
27 November 17, 2001, plaintiffs's claims are time barred. Each of
28 these arguments is addressed below.

1 **I. Plaintiff's Official Capacity Claims Against**
2 **Judge Unpingco Is Barred By Sovereign Immunity.**

3 The Supreme Court has explained that official-capacity
4 claims are simply an alternative means of pleading an action
5 against the governmental entity involved, in this case the United
6 States Government. See Hafer v. Melo, 502 U.S. 21, 25 (1991).
7 It is settled that the United States, as the sovereign, is immune
8 from suit unless it has consented to be sued. See United States
9 v. Sherwood, 312 U.S. 584 (1941). The United States has not
10 waived its sovereign immunity on constitutional tort claims.
11 Federal Deposit Insurance Corporation v. Meyer, 510 U.S. 471, 478
12 (1994). Thus, any purported damages claim against Judge Unpingco
13 in his official capacity is simply a claim against the United
14 States that is barred by sovereign immunity. See, e.g., Clemente
15 v. United States, 766 F.2d 1358, 1362-64 (9th Cir. 1985), cert.
16 denied, 474 U.S. 1101 (1986); Arnsberg v. United States, 757 F.2d
17 971, 980 (9th Cir. 1985), cert. denied, 475 U.S. 1010 (1986).

18 **II. Judge Unpingco Is Entitled To Absolute Immunity.**

19 The plaintiff also seeks judgment in damages against Judge
20 Unpingco individually. Davis v. Passman, 442 U.S. 228, 248-49
21 (1979), allows federal jurisdiction under 28 U.S.C. § 1331 for
22 claims for damages against federal officials sued in their
23 individual capacities for alleged violations by those officials
24 of constitutional rights. (Plaintiff asserts a First and Fourth
25 Amendment constitutional claim in the Complaint.) These types of
26 damages claims are generally cognizable under the rationale of
27 Bivens v. Six Unknown Named Agents of Federal Bureau of
28 Investigation.

1 Narcotics, 403 U.S. 388 (1971). However, in the case at bar,
2 Judge Unpingco is shielded from personal liability by absolute
3 immunity.^{2/}

4 **A. The Judicial Immunity Doctrine.**

5 The rule that judges are absolutely immune from suit for
6 civil damages claimed to arise from judicial acts has been firmly
7 established for well over a century. In its seminal decision in
8 Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1871), the
9 Supreme Court held that our adversary system of justice required
10 absolute immunity for judges, so that a judge would "be free to
11 act upon his own convictions, without apparent apprehension of
12 personal consequences to himself." Since then the rule has been
13 consistently applied over time, and was reiterated in Stump v.
14 Sparkman, 435 U.S. 349 (1978), where the Supreme Court again
15 explained that a judge may not be sued for damages said to arise
16 from judicial acts, even if "the action he took was in error, was
17 done maliciously, or was in excess his authority...." Id. at
18 356. Only non-judicial acts taken in the clear absence of all
19 jurisdiction are not covered.^{3/} Id. at 357. However, absolute

20 _____
21 ^{2/} In addition to being protected by judicial immunity,
22 plaintiff fails to plead any cognizable constitutional claim
23 against Judge Unpingco. As to plaintiff's First Amendment claim,
24 no facts are alleged which reveal that Judge Unpingco acted with
25 the impermissible motive of curbing plaintiff's protected speech.
26 And as to any purported due process claim, plaintiff has not
27 alleged facts showing that he has been deprived of any process
28 that was or may have been his due. Finally, the Fourteenth
Amendment applies only to state action and Judge Unpingco was
acting under color of federal law.

^{3/} In Bradley, the Supreme Court illustrated the distinction
between lack of jurisdiction and excess of jurisdiction with the
following examples: if a probate judge, with jurisdiction over
only wills and estates, should try a criminal case, he would be

1 immunity covers all judicial acts even if alleged to have been
2 undertaken in flagrant disregard of fundamental due process. Id.
3 at 359-60. See also Schucker v. Rockwood, 846 F.2d 1202, 1204
4 (9th Cir. 1988) ("Grave procedural errors or acts in excess of
5 judicial authority do not deprive a judge of ... immunity.").

6 The broad reach of the judicial immunity doctrine is aptly
7 illustrated by the Ninth Circuit's decision in Ashelman v. Pope,
8 793 F.2d 1072 (9th Cir. 1986) (en banc). In that case, a state
9 inmate filed a civil rights action against a judge and prosecutor
10 alleging that they had conspired to pre-determine the outcome of
11 his criminal prosecution by generally depriving him of the
12 opportunity to prepare and present a defense. In affirming
13 dismissal of the plaintiff's claims in that case, the Ninth
14 Circuit en banc court in Ashelman stated:

15 Judges' immunity from civil liability should not be
16 "affected by the motives with which their judicial acts
17 are performed." Intent should play no role in the
18 immunity analysis. Moreover, allegations that a
19 conspiracy produced a certain decision should no more
20 pierce the actor's immunity than allegations of bad
21 faith, personal interest or malevolence

22 Id. at 1077-78 (citations omitted). Thus, as long as the
23 challenged acts can somehow be viewed as judicial actions taken
24 under even colorable authority of the court ("[j]urisdiction is

25 _____
26 acting in the clear absence of jurisdiction and would not be
27 immune from liability for his action; on the other hand, if a
28 judge of a criminal court should convict a defendant of a
nonexistent crime, he would be acting in excess of his
jurisdiction and would be immune. 80 U.S. at 352.

1 construed broadly where the issue is the immunity of a judge,"
2 citing Stump, 435 U.S. at 356), the defendant judge is cloaked
3 with absolute judicial immunity. Crooks v. Maynard, 913 F.2d
4 699, 700-01 (9th Cir. 1990).

5 **B. Judge Unpingco Was Performing A Judicial Act.**

6 The Ninth Circuit has established a four factor test to
7 determine whether a judge's act giving rise to a damages suit is
8 a "judicial" act shielded by absolute immunity. Under this test,
9 a judge is immune if

10 (1) the precise act is a normal judicial function; (2)
11 the events occurred in the judges chambers; (3) the
12 controversy centered around a case then pending before
13 the judge; and (4) the events at issue arose directly
14 and immediately out of a confrontation with the judge
15 in his or her official capacity.

16 Meek v. County of Riverside, 183 F.3d 962, 967 (9th Cir.), cert.
17 denied, 528 U.S. 1005 (1999). "These factors are to be construed
18 generously in favor of the judge and in light of the policies
19 underlying judicial immunity." Ashelman, 793 F.2d at 1076
20 (citation omitted).

21 In the case at bar, there is no doubt that this test is
22 satisfied. All of the acts challenged by plaintiff involve Judge
23 Unpingco efficiently making decisions in his court. The Ninth
24 Circuit has made it clear that "[r]uling on a motion is a normal
25 judicial function." Duvall v. County of Kitsap, 260 F.3d 1124,
26 1133 (9th Cir. 2001). In addition, all of the acts challenged
27 by the plaintiff occurred within Judge Unpingco's courtroom or
28 chambers, or arose from written judicial decisions. Finally, it

1 is also clear from the allegations in the Complaint that all the
2 events at issue here arose directly and immediately from
3 plaintiff's interactions with Judge Unpingco in his official
4 capacity as the presiding U.S. District Judge in the plaintiff's
5 underlying civil cases.

6
7 **C. Judge Unpingco Did Not Act In The Clear Absence
Of All Jurisdiction.**

8 It is also clear that Judge Unpingco meets the second prong
9 of the judicial immunity test. As the Ninth Circuit said in
10 Ashelman, the policy requirements of absolute immunity dictate
11 that where the immunity is at issue, the jurisdiction of the
12 judge must be broadly construed, and the policy considerations of
13 the judicial immunity favor "a liberal application of immunity."
14 793 F.2d at 1078. Whether a judge acted in the clear absence of
15 jurisdiction does not depend upon whether the judge correctly
16 decided the particular issue before the court. See Mullis v.
17 United States Bankruptcy Court, 828 F.2d 1385, 1389 (9th Cir.
18 1987). Instead, immunity turns upon whether a judge acts within
19 the broad scope of the court's subject matter jurisdiction when
20 he or she takes the challenged judicial acts. See also New
21 Alaska Development Corp. v. Guetschow, 869 F.2d 1298, 1302 (9th
22 Cir. 1989) (quoting Ashelman, 793 F.2d at 1078) ("[j]udicial
23 immunity is a defense so long as 'the judge's ultimate acts are
24 judicial actions taken within the court's subject matter juris-
25 diction.'"). Here, it cannot be disputed with any seriousness
26 that subject matter jurisdiction existed over the plaintiff's
27 underlying civil cases.

28 Since Judge Unpingco was presiding over a case brought into

1 federal court by the plaintiff himself for alleged wrongs
2 committed by others, the Judge meets the second prong of the
3 judicial immunity test.

4 There is no doubt or challenge that the Judge had subject
5 matter jurisdiction to hear the case and make the rulings he did,
6 which are the basis for plaintiff's claims.

7 In sum, it is clear from the Complaint that Judge Unpingco
8 acted within the broad scope of this Court's jurisdiction.

9
10 **III. The Plaintiff's Claims Against Judge Unpingco
Should Be Dismissed Without Leave To Amend.**

11 The purpose of the judicial immunity doctrine is to allow
12 judges to decide matters before their courts with freedom and
13 independence and without the intimidation or fear of harassing
14 litigation. Judge Unpingco was called upon as the judge in
15 plaintiff's underlying civil cases to take actions and make
16 decisions which plaintiff now perceives as in error. As a
17 consequence, plaintiff joined Judge Unpingco as a defendant in
18 the present civil action in a transparent attempt to collaterally
19 attack Judge Unpingco's judicial rulings. This is exactly the
20 kind of situation that the doctrine of judicial immunity is
21 intended to protect against, and accordingly, Judge Unpingco is
22 entitled to absolute immunity from plaintiff's claims, which
23 should be dismissed without leave to amend.

24 The Ninth Circuit laid out the five factors to consider when
25 granting a motion to dismiss without leave to amend in Schmier v.
26 United States Court of Appeals for the Ninth Circuit, 279 F.3d
27 817 (9th Cir. 2002). The same factors used to examine the
28 correctness of granting a motion for leave to amend apply,

1 namely: "(1) bad faith; (2) undue delay; (3) prejudice to the
2 opposing party; (4) futility of amendment; and (5) whether the
3 plaintiff has previously amended his complaint." *Id.* at 824
4 (quoting *In re Consolidated Pioneer Mortgage*, 205 B.R. 422, 426
5 (9th Cir. BAP 1997)). In this case, the most relevant factor is
6 the fourth, futility of amendment. That factor frequently means
7 that "it was not factually possible for [plaintiff] to amend the
8 complaint so as to [state a cognizable claim]." *Id.* See also
9 *Chang v. Chen*, 80 F.3d 1293, 1295 (9th Cir. 1996) ("We also
10 affirm the district court's decision to dismiss without leave to
11 amend because there is no reason to believe that any amendment
12 would cure the deficiency."); *Havas v. Thornton*, 609 F.2d 372,
13 376 (9th Cir. 1979) ("It is clear, however, that leave to
14 further amend the complaint would serve no purpose, since the
15 acts complained of could not constitute a claim for relief...").
16 Based upon this authority, this Court should dismiss plaintiff's
17 claims without leave to amend because Judge Unpingco is entitled
18 to absolute immunity, and given that entitlement, plaintiff in
19 this case simply cannot state a claim for relief.

20 **IV. Plaintiff's Claims Are Also Time Barred.**

21 Plaintiff commenced the present action in this Court on
22 November 17, 2003. Consequently, because plaintiff claims
23 against Judge Unpingco rely on events that occurred prior to
24 November 17, 2001, plaintiff's claims are time barred.

25 The statute of limitations applicable to plaintiff's
26 constitutional claims (see Complaint, Count 1, ¶¶ 49-53) is the
27 state personal injury statute. *Van Strum v. Lawn*, 940 F.2d 406,
28 410 (9th Cir. 1991). See also *Wilson v. Garcia*, 471 U.S. 261

1 (1985) (for limitations purposes, Civil Rights actions are best
2 characterized as personal injury actions; state statutes govern-
3 ing actions for an injury to the person govern timeliness of
4 Civil Rights actions). In Guam, actions for injury to the person
5 or to the rights of another must be commenced within 2 years.
6 See Guam Civ. Proc. Code § 33. In this case, plaintiff complains
7 about lawsuits dismissed by Judge Unpingco in 1998 and 1999.
8 Thus, because these events occurred prior to November 17, 2001,
9 they are time barred.

10 **CONCLUSION**

11 For the reasons stated above, Judge Unpingco is protected by
12 the doctrine of absolute immunity and entitled to a dismissal of
13 the plaintiff's claims without leave to amend.

14 Respectfully submitted,

15
16 C. SALVATORE D'ALESSIO, JR.
17 Senior Trial Attorney
18 Constitutional Torts Staff
19 Civil Division, Torts Branch
20 U.S. Department of Justice
21 Washington, D.C. 20044-7146

22 LEONARDO M. RAPADAS
23 United States Attorney
24 Districts of Guam and NMI

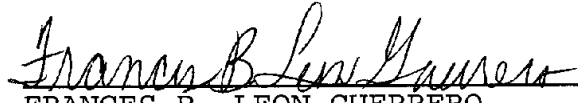
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27
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BY: 

RUSSELL C. STODDARD
First Assistant U.S. Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing, has been furnished, via regular first class U.S. mail, certified postage prepaid, this 8th day of March 2004, to the following:

Sean Francis School Mafnas
Pro Se
386 Chalan Jota Street
Pualanta, Yona
Tel: 789-2787
Cell: 689-7556


FRANCES B. LEON GUERRERO
Legal Assistant